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The Florida Bar v. Thomson, 310 So. 2d 300 (Fla. 1975)

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CASE COMMENTS

Attorney Discipline—SUSPENDED LAWYER MAY TAKE EMPLOYMENT AS A LAW CLERK—*The Florida Bar v. Thomson*, 310 So. 2d 300 (Fla. 1975).

In 1972 the Florida Bar recommended that attorney Charles Thomson be disbarred.¹ After considering the Bar's recommendations, the Supreme Court of Florida responded by suspending Thomson for 2 years and thereafter until he showed himself rehabilitated.² The charges of which Thomson was found guilty by the referee in his disciplinary trial³ were numerous: (1) conviction in Palm Beach County on two counts of issuing worthless checks; (2) conviction in Polk County on a charge of absconding from a motel without paying a \$750.00 bill; (3) conviction in Polk County on three counts of issuing worthless checks; (4) actively practicing law while under suspension for failure to pay Bar dues; (5) making false affidavits concerning his date of birth and proper name; and (6) agreeing to perform certain services for a client, taking a fee therefor, but never performing and never returning the fee.⁴

While suspended for the preceding misconduct Thomson obtained work as a clerk with a Vero Beach law firm.⁵ The Florida Bar

1. Charles Thomson was tried by referee pursuant to INTEGRATION RULE OF THE FLORIDA BAR 11.06, 32 FLA. STAT. ANN. (Supp. 1975-76). At the conclusion of the trial the referee recommended suspension for 24 months. The Florida Bar considered the recommended discipline too lax. *The Florida Bar v. Thomson*, 271 So. 2d 758, 759 (Fla. 1972). The Bar thereupon petitioned the court to review the recommended discipline, pursuant to the INTEGRATION RULE OF THE FLORIDA BAR 11.06(9)(c)(iii) which states: "If the Board of Governors disagrees with the discipline recommended in a referee's report finding the respondent guilty, the Board may seek review in the Supreme Court as provided in Rule 11.09."

2. *The Florida Bar v. Thomson*, 271 So. 2d 758, 762 (Fla. 1972). INTEGRATION RULE OF THE FLORIDA BAR 11.10(3), 32 FLA. STAT. ANN. (Supp. 1975-76), provides that "a suspension of more than three months shall require proof of rehabilitation . . ." Regarding evidence for reinstatement, INTEGRATION RULE OF THE FLORIDA BAR 11.11(1)(b), 32 FLA. STAT. ANN. (Supp. 1975-76), states:

The information required concerning the petitioner may include any or all of the following matters in addition to such other matters as may be reasonably required to determine the fitness of the petitioner to resume the practice of law: criminal and civil judgments; disciplinary judgments; copies of income tax returns together with consents to secure original returns; occupation during suspension and information in connection therewith; financial statement; statements of restitution of funds which were the subject matter of disciplinary proceedings.

3. See note 1 *supra*.

4. *The Florida Bar v. Thomson*, 271 So. 2d 758, 761 (Fla. 1972).

5. Emphasizing that his work involved no client contact, Thomson described his activities as limited to "work of a preparatory nature such as research, taking statements of witnesses consistent with initial investigation of a case, assembling information

questioned the ethical propriety of Thomson's employment and pressured his employers to discharge him.⁶ At that point Thomson petitioned the supreme court to decide the issue of whether an attorney who is suspended from the practice of law for disciplinary reasons may work as a clerk for a law firm during his suspension.⁷ The court decided that "under the facts and circumstances of this case" he could.⁸

The majority opinion acknowledged the two principal arguments made by the Bar. First, that allowing the employment "would be detrimental to the integrity and reputation of the Bar"⁹ Second, that allowing such employment would invite violation of the suspension order.¹⁰ The court met the second argument squarely, replying that though suspended, Thomson remained "subject to the Code of Professional Responsibility and the Integration Rule of the Florida Bar,"¹¹ was directly supervised, and could be brought to account if he overstepped his status.¹² Though it noted the first argument raised by the Bar, the court declined to provide a significant response.

Instead, the court provided a catalog of the commendable ends to be achieved by allowing such employment: the disciplined attorney would be enabled to support his family;¹³ he would be able

for review, and like work that would enable the attorney-employer to carry a given matter to a conclusion" *The Florida Bar v. Thomson*, 310 So. 2d 300, 301 (Fla. 1975).

6.

[T]he staff counsel of The Florida Bar contacted one of [Thomson's] attorney-employers and expressed the opinion that the stated arrangement with a suspended attorney was unethical. The Bar then advised Thomson's attorney-employer that [the Bar] intended to file a grievance against him unless he ceased Thomson's employment

Id. at 301.

Exactly why the Bar thought the employment unethical was not stated in the record or in its brief. The Bar's argument on this point was phrased in general terms.

7. *Id.* at 300.

8. *Id.* The court did not mention Thomson in its formulation of the issue, choosing instead to draw the issue in reference to "an attorney suspended from the practice of law," 310 So. 2d at 300. The general language might be an indication that the relief granted Thomson will be available to other attorneys, but the inclusion of the limiting phrase "under the facts and circumstances of this case" suggests that this interpretation would probably be too broad.

9. *Id.* at 301.

10. *Id.*

11. *Id.* The court cited INTEGRATION RULE OF THE FLORIDA BAR 11.10(3), FLA. STAT. ANN. (Supp. 1975-76), which states that "[d]uring such suspension the respondent shall continue to be a member of The Florida Bar"

12. 310 So. 2d at 302.

13. *Id.* The implication is that, because of Thomson's "questionable" character, no lay employer would hire him for any type work. This leads to the apparently

to maintain his legal proficiency and improve his chances of passing the reentrance examination;¹⁴ and finally, he would be ideally situated to demonstrate his rehabilitation.¹⁵ In the opinion of the court, it would be "unduly harsh" to the offending attorney to deny him any opportunity of employment.¹⁶ The court reasoned that if the activities of unlicensed student law clerks are not the practice of law, then the same activities are not the practice of law when performed by a suspended attorney.¹⁷ The court drew a similar comparison to the work of paraprofessionals and paralegals.¹⁸

Only Justice Overton dissented. He viewed the majority's decision as "another step to effectively dilute the punishment."¹⁹ More important to this dissenting view was the perception that the court's action may make professional discipline appear very lax to the public, and may result in detriment to the integrity and reputation of the bar.²⁰ The Justice expressed doubt that any attorney in such a situation could successfully confine himself to preparatory functions.²¹

anomalous result that the worse an attorney's misconduct, the more reason there is to keep him in the profession since no reputable lay employer would consider hiring him. The ultimate end would seem to be that the most debased lawyers of all must at last go to work for the court itself, since not even law firms would have them.

14. 310 So. 2d at 302. The court pointed out that attorneys who, for disciplinary reasons, have not been practicing law may be required to retake and pass the bar examination, at the court's discretion. See INTEGRATION RULE OF THE FLORIDA BAR 11.10(3), 32 FLA. STAT. ANN. (Supp. 1975-76).

15. See note 2 and accompanying text *supra*.

16. 310 So. 2d at 302.

17. There is no question that, had Thomson been a student law clerk, his activities would not have raised the issue of unauthorized practice of law. Payton, *Law Office Personnel and Legal Ethics*, 48 FLA. B.J. 747 (1974). The question is whether Thomson's activities, in light of his status, sufficiently resemble the practice of law to violate his disciplinary sentence.

18. The paralegal comparison, as the law clerk comparison, (note 17 and accompanying text *supra*) is rebuttable. The comparison is based on seeming similarity of status; both suspended attorneys and paralegals are forbidden to practice law. The court reasoned that holding persons of similar status to different standards would be unjust, if it is assumed that what is not the practice of law for one is likewise not for the other. The significant difference is that suspended attorneys are members of the Bar, 310 So. 2d at 301, while paralegals and law clerks are not. The Bar professes to hold itself to higher standards of ethical conduct than the general population. State *ex rel.* Florida Bar v. Fishkind, 107 So. 2d 131 (Fla. 1958). It follows that there is no inequity in holding suspended attorneys to higher standards than those applied to nonlawyers.

Even if the validity of the comparison were accepted, there is still significant controversy whether paralegals engage in the unauthorized practice of law. See, e.g., Rivkind, *Paralegal—A Stormy Petrel*, 48 FLA. B.J. 745 (1974).

19. 310 So. 2d at 303.

20. *Id.*

21. The dissenting opinion notes that the Bar's disciplinary rules presently have no provision for actively monitoring such employment to assure compliance with the suspension order. *Id.*

The dissent found the analogy between law clerks and suspended attorneys performing the same work flawed by its failure to consider the difference between the underlying reasons for the attorney's suspension and the student's inability to practice law.²² The dissent therefore concluded that, given present disciplinary rules,²³ a suspended attorney "should not be employed as a clerk for an attorney or law firm . . . during the . . . suspension" ²⁴

The question raised in *Thomson* is one of first impression in Florida, and it appears that the issue has been dealt with directly in only one other jurisdiction.²⁵ The general question of disciplined lawyers working in a law office has, however, been dealt with in several cases though none were cited by the court.²⁶ Although in the reported cases the clerking activities were more extensive than those involved in *Thomson*, the courts evinced an adverse, if not positively hostile, reaction to the concept of a suspended attorney working in a law office. In deciding this case as it did, the supreme court differed with the philosophy and results of all but two²⁷ of the reported cases on the subject.

Since the disciplined attorney in this case interviewed and took statements from witnesses, the question of appearances to the general

22. *Id.* COMMITTEE ON PROFESSIONAL ETHICS OF THE FLORIDA BAR 1967-1968, SELECTED OPINIONS, OPINION NO. 65-69, at 333 (1969), recognizes the same flaw in *Thomson's* analogy. The opinion states, "A lawyer should not employ a disbarred lawyer for legal research." The comment continues:

Some may see the situation as similar to the employment of a law student or law clerk who is studying for the bar examination. The Committee sees a difference between a law student or neophyte law graduate, who has not yet completed his training and examinations, and the employment of a person who has practiced law and whose right to do so has been revoked by proper authority because of demonstrated unworthiness. *Id.* at 333-34.

23. See note 21 *supra*.

24. 310 So. 2d at 303.

25. *In re Lizotte*, 79 A. 960 (R.I. 1911).

26. See, e.g., *Crawford v. State Bar*, 355 P.2d 490 (Cal. 1960) (although services performed by disbarred attorney might have been performed by laymen, it does not follow that when they are performed by an attorney, they do not involve the practice of law); *In re McKelvey*, 255 P. 834 (Cal. Ct. App. 1927) (the giving of advice to employer's clients on small matters by disbarred attorney employed as law office assistant was not unauthorized practice of law); *Application of Christianson*, 215 N.W.2d 920 (N.D. 1974) (suspended attorney may work as a law clerk); *Houts v. State ex rel. Oklahoma Bar Ass'n*, 486 P.2d 722 (Okla. 1971) (a disbarred attorney who contracted to recode a city's ordinances, who prepared and filed annual reports in guardianship cases, and who selected appropriate deeds and contracts for transferring property, engaged in the unauthorized practice of law).

27. In *Application of Christianson*, 215 N.W.2d 920 (N.D. 1974), *Christianson* petitioned the North Dakota Supreme Court for reinstatement as an attorney. The court denied his petition because *Christianson* had been guilty of the unauthorized practice of law during his suspension. The court said: "On the one hand, it seems extremely

public is relevant. *In re Lizotte*²⁸ involved an attorney under disciplinary suspension who was brought before the court for performing law office tasks that the court recognized laymen could legitimately perform. Lizotte argued that he was performing the activities of a clerk. The opinion of the Rhode Island Supreme Court left no doubt as to its position:

It has been urged as an excuse for this conduct of the respondent that the things which he is charged with doing in violation of said decree he might well do if he was not a member of the bar The purpose of this court is not to be nullified by an approval of such reasoning. [This court] will not permit its disciplinary orders to be evaded, nor will it allow its officer to publicly disregard its decree by such a subterfuge. . . . While it is true that persons who are not of the legal profession at times assume to do the things which this respondent has done since his suspension, they do not, and they would not be permitted to, so act in the guise of attorneys at law. Members of the bar who are under suspension will be required to comply with the terms of the decree suspending them in such a manner that there may be no ground for suspicion on the part of other members of the bar or of the public that the decrees of this court are not being exactly observed in their letter and their spirit.²⁹

Similarly, in *State ex rel. Patton v. Marron*,³⁰ the New Mexico Supreme Court said of a suspension order it had rendered: "[O]nce an order is made, [the court] owes it to itself, the members of the bar, and the public, to see that the order is fully and fairly obeyed and to punish for its violation."³¹

harsh to rule that a suspended lawyer . . . should further be deprived of opportunities to earn a living by . . . doing legal research as a law clerk to a licensed attorney." *Id.* at 924. *Christianson* is weak authority on this point because: (1) the parts of the opinion dealing with suspended lawyers as law clerks are dicta; (2) the court did not say it would allow such activity on the part of suspended lawyers, but only that it seemed harsh *not* to allow it; and (3) the opinion contains a serious internal inconsistency. The court cites as authority for its position on the clerking issue *In re McKelvey*, 255 P. 834 (Cal. Ct. App. 1927). *McKelvey* stated that sympathy must not be the deciding factor in disciplinary matters; the *Christianson* court, however, clearly based its decision on sympathy for Christianson.

McKelvey is itself a victim of the same contradiction. On being petitioned by McKelvey for reinstatement, the court stated that employment as a law clerk of an attorney who is under discipline is not objectionable. The *McKelvey* court disavowed sympathy as a legitimate consideration, yet based its decision on sympathy. The court pointed out that the attorney seeking reinstatement was 67 years old and had been disbarred for 10 years. 255 P. at 836.

28. 79 A. 960 (R.I. 1911).

29. *Id.* at 961.

30. 167 P. 9 (N.M. 1917).

31. *Id.* at 11.

The Supreme Court of Florida has on numerous occasions stated that the public interest should be the primary consideration in any disciplinary proceeding.³² Yet the principal focus of the *Thomson* opinion was upon the disciplined attorney's personal plight. The court noted that there was a "public appearance" argument; however, it not only failed to balance the conflicting demands involved, but declined to provide any response to the argument. The opinion mentioned the public only once, sandwiching it in a single sentence reference between the interests of the disciplined attorney, his family, and his law firm-employer on one side, and the interests of the "Bar as a whole" on the other.³³ (The court offered several affirmative justifications for allowing the employment,³⁴ but all were predicated upon concern for the disciplined attorney.) The dissent clearly felt the public's interest had not been given sufficient consideration.³⁵

32. See, e.g., *The Florida Bar v. Thomson*, 271 So. 2d 758, 761 (Fla. 1972) ("The purpose of assessing penalties is to protect the public interest . . ."); *The Florida Bar v. Beaver*, 259 So. 2d 143, 144 (Fla. 1972) ("In determining the discipline to which respondent should be subjected, we must be primarily guided by the welfare of the public and the legal profession."); *The Florida Bar v. Loveland*, 249 So. 2d 19 (Fla. 1971); *The Florida Bar v. Winn*, 208 So. 2d 809 (Fla.), cert. denied, 393 U.S. 914 (1968) ("Disciplinary proceedings are essentially a function of the Court instituted in the public interest . . ." 208 So. 2d at 810. A disciplinary proceeding "does not afford redress for a private grievance. It is an act undertaken and carried forward solely for the public welfare." *Id.* at 811, citing *In re Keenan*, 192 N.E. 65, 68 (Mass. 1934)); *State ex rel. Florida Bar v. Ruskin*, 126 So. 2d 142, 144 (Fla. 1961) ("In prescribing the judgment hereafter announced we take into consideration that our order should give due regard to the public interest [in disciplinary proceedings] . . ."); *Petition of Florida State Bar Ass'n*, 186 So. 280, 289 (Fla. 1938) ("[P]ractice of the law is not an inherent right. It is a privilege or franchise granted by the state, and, being so, its exercise may be regulated in the interest of the public."). See also 4 *MIAMI L.Q.* 111, 113 (1950): "The discipline of unethical practitioners is only an incidental objective of the integrated bar. Rather, integration is designed . . . to give the bar a true concept of its relation to the public and to the profession."

The integration of the Florida Bar into a cohesive whole was accomplished via the Integration Rule of The Florida Bar. The rule was formulated at the direction of the supreme court, and defines the functions and organization of The Florida Bar. The rule states that "[t]he primary purpose of discipline of attorneys is the protection of the public . . ." INTEGRATION RULE OF THE FLORIDA BAR 11.02, 32 *FLA. STAT. ANN.* (Supp. 1975-76). The majority of jurisdictions are likewise guided primarily by the public's interest in dealing in disciplinary matters. See, e.g., *McKenzie v. Burris*, 500 S.W.2d 357 (Ark. 1973); *Fords Case*, 149 A.2d 863 (N.H. 1959). See also Manning, *A Socio-Ethical Foundation for Meeting the Obligations of the Legal Profession*, 5 *CUMBERLAND-SAMFORD L. REV.* 237 (1974).

33. 310 So. 2d at 302: "Thus, we think Thomson should not be prohibited from employment . . . inasmuch as such employment is clearly beneficial to him, his family, his attorney-employers, the public and the Bar . . ." *Id.*

34. See text accompanying notes 13-15 *supra*.

35. See text accompanying notes 20-23 *supra*. The dissent's arguments revolve around the public interest: (1) the public would be confused; (2) the suspended attorney at bar had cheated a member of the public; and (3) the public has no protection against the further derelictions of the suspended attorney.

On prior occasions the court has acknowledged that the legal profession must have the public's confidence in order to properly perform its duties.³⁶ If this is to be more than a platitude, maintaining the public's confidence in the bar necessitates discipline of members who bring discredit upon the profession.³⁷ In *State ex rel. Florida Bar v. Murrell*, the court succinctly stated that while the decision to discipline "must be fair to respondent at the same time the duty of the court to society is paramount."³⁸ In *In re Gaines*,³⁹ the Alabama Supreme Court, on petition of a disciplined attorney for reinstatement, said: "We confess we have been somewhat moved to sympathy [for the petitioner] Sympathy, however, is not the pole star to guide judicial decision and such recommendations, where apparently motivated principally by sympathy and the belief that the petitioner has been sufficiently punished, do not constitute sufficient basis for reinstatement." The United States Supreme Court enunciated the same principle in *Ex parte Wall*:⁴⁰

But when such a case [of obvious misconduct] is shown to exist, the courts ought not to hesitate, from sympathy for the individual, to protect themselves from scandal and contempt, and the public from prejudice, by removing grossly improper persons from participation in the administration of the laws.⁴¹

Henry Drinker, recognized as the eminent authority in the area of professional ethics and attorney discipline, has also indicated strong disapproval of sympathy as a deciding factor. Mr. Drinker has noted that the profession often feels sorry for the backsliding lawyer and his family. Out of sympathy, the profession will recommend leniency

36. *E.g.*, *The Florida Bar v. Wagner*, 212 So. 2d 770 (Fla. 1968), where the court approvingly quotes the referee in the disciplinary trial below: "'Without the respect and confidence of the public, it is impossible for the profession to discharge its duties effectively and efficiently, which duties are graver now than ever before in history.'" *Id.* at 773. In *In re Florida Bar*, 301 So. 2d 448, 451 (Fla. 1974), the court said: "It is [the court's] responsibility to . . . maintain the image and integrity of the Florida Bar as a whole."

THE FLORIDA BAR CODE OF PROFESSIONAL RESPONSIBILITY Canon 9: "A Lawyer Should Avoid Even the Appearance of Professional Impropriety." If this be true of an individual lawyer, it must also be true for the profession as a whole. *See also* Sheppard, *The Lawyer's Ethical Response*, 49 FLA. B.J. 184, 186 (1975).

37. *See State ex rel. Florida Bar v. Fishkind*, 107 So. 2d 131, 133 (Fla. 1958) (the profession is often measured in the layman's mind by the manner in which it disciplines attorneys who violate professional rules of conduct).

38. 74 So. 2d 221, 227 (Fla. 1954).

39. 37 So. 2d 273, 274 (Ala. 1948). *See In re McKelvey*, 255 P. 834 (Cal. Ct. App. 1927).

40. 107 U.S. 265 (1882).

41. *Id.* at 288.

and this leniency, Drinker observed, will not be tolerated by the public.⁴² It has been said that the highest degree of development of a profession is "[t]he stage where public needs are placed paramount to professional rights and even desires."⁴³ As recently as 1970, the Clark Committee, commissioned by the American Bar Association to study disciplinary enforcement, observed that "a policy that benefits the individual complainant while exposing the public at large to substantial risks is inconsistent with the primary purpose of disciplinary enforcement—the . . . protection of the public."⁴⁴ There are probably mitigating circumstances in every instance of public attorney discipline.⁴⁵ The public, however, is only aware of the fact that an attorney, who has been found guilty of misconduct, is nevertheless continuing to work within the profession. There is clearly a substantial risk that the public will conclude that the legal profession winks at the derelictions of its members. Such a conclusion can only erode confidence in the integrity of the profession as a whole. The public interest cannot be served by a bar in which the public lacks confidence. At a time when public opinion of the profession is already low,⁴⁶ the public interest argument is entitled to a more meaningful response than that announced in *Thomson*.

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42. *The Public's Impression of Lawyers' Ethics—A Panel Discussion*, 7 U. FLA. L. REV. 439, 448 (1954).

43. Kohne, *The Significance of the Professional Ideal*, 101 ANNALS 1, 4 (1922).

44. ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT 99 (Final Draft 1970).

45. Thomson testified that he was undergoing serious personal problems at the time of his misconduct. 271 So. 2d at 762.

46. See generally Carrington, *The Ethical Crises of American Lawyers*, 36 U. PITT. L. REV. 35, 49 (1974); Manning, *If Lawyers Were Angels: A Sermon in One Canon*, 60 A.B.A.J. 821 (1974); Burbank & Duboff, *Ethics and the Legal Profession: A Survey of Boston Lawyers*, 9 SUFF. U.L. REV. 66 (1974); ABA SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT 2 (Final Draft 1970): "The Committee emphasizes that the public dissatisfaction with the bar and the courts is much more intense than is generally believed within the profession." The above committee report was written before the Watergate affair.